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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. [redacted] 213

THE WEBSTER MOTOR CAR COMPANY,
Petitioner,

v.

PACKARD MOTOR CAR COMPANY, ET AL.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

HAROLD L. SMITH
JEROME G. SHAPIRO
One Wall Street
New York 5, New York

ROBERT W. BARKER
744 Jackson Place
Washington 6, D. C.

Attorneys for Respondents

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THE WEBSTER MOTOR CAR COMPANY, *Petitioner*,	
v.	No. 1113
PACKARD MOTOR CAR COMPANY, *et al.*, *Respondents*.	

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

This brief is filed by respondents, Packard Motor Car Company (hereinafter referred to as "Packard"), Marshall Beck and C. M. Porter, in opposition to the petition of The Webster Motor Car Company (hereinafter referred to as "Webster") for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above case on April 18, 1957.

QUESTIONS PRESENTED

1. Was the court below correct in holding, as an alternative and completely dispositive common law ground of decision apart from any antitrust question, that the alleged acts complained of gave rise to no claim because Webster rejected the usual one-year renewal of its dealership agreement?

2. Was the court below correct in holding that there was no violation of the antitrust laws where a small automobile

manufacturer, for the purpose of protecting and improving its competitive position vis-a-vis manufacturers of other makes in a city, made one of its dealers the sole dealer in the city, pursuant to an agreement with that dealer, by failing to renew expiring agreements with other dealers there?

3. Was the court below correct in holding that an otherwise legal elimination of all but one of the dealers of an automobile manufacturer in a city for the purpose of giving the remaining dealer an exclusive dealership there was not made illegal under the antitrust laws by the fact that the remaining dealer had requested the exclusive dealership?

4. Was the court below correct in holding that, since there were automobiles of other manufacturers reasonably interchangeable by consumers for the same purposes as Packard automobiles which composed a very small segment of the automobile market, an exclusive contract for the marketing of Packards in one city did not create an illegal monopoly?

STATEMENT OF THE CASE

A separate statement of the case is made necessary by numerous inaccuracies* and important omissions in Webster's statement.

Proceedings Below

The decision below was on an appeal to the United States Court of Appeals for the District of Columbia from a treble damage judgment of the United States District

*An illustration of such inaccuracies appears on page 33 of the petition. There, in paragraph A, Webster states that the evidence warranted the jury in finding certain facts respecting the relationship between Zell and Webster from 1937 to 1942. The principal record reference cited is "R. 1053-4", a document dated August 31, 1938. This document was Plaintiff's Exhibit 122 *for Identification*. It was excluded from evidence upon objection (R. 619).

Court for the District of Columbia in the amount of $570,000 with costs, and from an order awarding an attorneys' fee in the additional amount of $45,000 (R. 118, 119, 149).

The judgment had been entered on the verdict of the jury in an action under the antitrust laws tried before the Honorable Alexander Holtzoff (R. 118).

Respondents had moved unsuccessfully for a mistrial because of conduct of the court below which they had deemed improper and prejudicial (R. 832); for a directed verdict at the end of plaintiff's case (T. R.* 1002; R. 466), and at the close of all the evidence (T. R. 1765; R. 837); for judgment notwithstanding the verdict under Rule 50(b) of the Rules of Civil Procedure (R. 119, 136); and for a new trial (R. 122, 149). The opinion denying the latter two motions (R. 130) is reported at 135 F. Supp. 4. The majority and dissenting opinions of the court below are reported at 243 F. 2d 418.

The court below reversed the decision for error in denial of respondents' motion for judgment. It held that no violation of either Section 1 or Section 2 of the Sherman Act had been shown and held further that, in any event, no damage had been inflicted on Webster because Webster had rejected the usual one-year renewal of its dealership agreement. In view of its conclusion that respondents are entitled to judgment, the court did not reach the question presented as to whether a new trial should be granted because of errors and abuse of discretion at the trial.

Principal Contentions

Webster, a former Packard dealer in Baltimore, contended that it was forced out of business as a Packard dealer as the result of an alleged conspiracy between Packard and Zell Motor Car Company (hereinafter sometimes referred

*References to the typewritten record not printed appear as "T. R. .....".

to aid "Zell", another Packard dealer in Baltimore, to violate the antitrust laws by giving Zell a "monopoly" of Packard sales and service in Baltimore as the sole Packard dealer there.

Respondents contended, among other things, that there was no violation of the antitrust laws, and that Webster was not forced out of business as a Packard dealer, but, on the contrary, gave up its Packard dealership because it preferred the gamble of the present lawsuit.

Summary of Principal Facts

The principal facts in the case are set forth in detail with record references in the Appendix hereto (pp. 13-22, *infra*). The following is a summary of the principal facts:

Zell, one of Packard's largest and best dealers, told Packard it was losing money and asked Packard to make Zell the sole Packard dealer in Baltimore, indicating that unless made the sole dealer there it would quit. Packard decided to comply with Zell's request.

Packard was impelled to its business decision to make Zell sole dealer by the belief that Zell's intention to quit, if not made sole dealer, required it to choose between Zell and Webster; that it was very important to keep a dealer like Zell; that Webster had not been a satisfactory dealer; that Zell was much better qualified than Webster to be sole dealer; that Zell would improve Packard's then unsatisfactory competitive position in Baltimore; and that Zell would give the public the benefit of vigorous price competition.

Packard was one of the comparatively small automobile manufacturers. Packard's decision to make Zell the sole dealer in Baltimore was a normal business decision, and such a decision is commonplace in the automobile industry. It was not Packard's purpose to restrain trade or create a monopoly. Packard's purpose was to protect and improve its

competitive position vis-a-vis other automobile manufacturers in Baltimore and thus promote competition. This purpose was accomplished.

The market in which Zell operated was not a Packard market; it was an automobile market. Zell, as sole dealer, lacked power to fix prices or otherwise control this or any other market. There was no increase in prices or other injury to the public after Zell became sole dealer. On the contrary, the public got the benefit of more vigorous price competition and lower prices after Zell became sole dealer than it had before. There was no reduction in the flow of interstate commerce. On the contrary, the number of Packard cars sold in Baltimore increased.

The acts complained of were not the cause of Webster's ceasing to be a Packard dealer. It ceased to be a Packard dealer because it rejected Packard's offer of renewal.

Absence of Issues of Fact

The controlling issues were issues of law for the court rather than issues of fact for the jury. This is confirmed by the following statements of the trial court:

[Before the introduction of any evidence]

> "* * * As I understand the conspiracy, it is a conspiracy between Zell and Packard to take away the franchise from competing dealers and give Zell an exclusive franchise. So it looks to me as though *eventually it will come down to a question of law* as to whether those facts are or are not actionable under the antitrust laws, whether they do or do not constitute a violation of the antitrust laws. So that on the question of liability it is not unlikely, as I envisage the case, that it will probably go off on *a directed verdict one way or the other.*" (R. 157)

"* * * As I conceive the cause of action, it must be this: * * * that the plaintiff claims that when Zell came to Packard and said, 'I won't handle Packard cars any more unless you take away the franchise from Webster and give me the exclusive franchise,' and Packard acquiesced, that was an unfair restraint of trade. Packard in a sense did not act voluntarily. Is this the contention?

"Mr. Leahy [Webster's counsel]: That's the contention.

"The Court: *Then it will come down to a question of law* as to whether that is or is not a restraint of trade banned by the antitrust laws. * * *" (R. 158-9)

[During presentation of plaintiff's case]

"* * * That's a *question of law*, isn't it, whether this arrangement that was actually made, *whether that's a business arrangement permitted by the Sherman Act*, or whether it is banned by the Sherman Act. * * *" (R. 301)

[During presentation of defendants' case]

"* * * As I have followed the testimony so far, and I have checked my recollection of it by reading the transcript since the last session, *I do not find that there is a dispute concerning a single fact.* * * *" (R. 611). [Substantially the same statement as that italicized was made five times in the same colloquy (R. 611-12).]

"* * * Gentlemen, we have taken quite a bit of time with this case, and I hope we can bring it to a conclusion. I am going to repeat something I said before: *I haven't yet seen a single disputed fact in this case.* * * *" (R. 758)

[On the application for an attorneys' fee after judgment]

> "* * * when the testimony ended in this long trial *there wasn't a single fact in dispute.* * * *" (T. R. 1990)

ARGUMENT

The decision below was based on the alternative grounds (a) that, as a matter of general common law, the alleged acts complained of were not the proximate cause of any injury to Webster, and (b) that, as a matter of antitrust law, it was not illegal for Packard, a relatively small manufacturer competing with large manufacturers, to make its largest dealer in Baltimore the sole dealer there in order to retain that dealer and thus more effectively to compete with other manufacturers. There is no reason for review of the decision below on either ground.

A. The Causation Ground of the Decision

Nowhere in its petition does Webster mention the fact that the reversal below rested on the alternative ground that, as a matter of general common law, the alleged acts complained of "inflicted no damage" because Webster rejected the usual one-year renewal of its dealership agreement. The court below summarized the facts in this connection as follows:

> "* * * After Webster protested and threatened suit, Packard offered Webster the usual one-year renewal but refused to promise more. Packard told Zell, in effect, that this would be Webster's last renewal. Webster declined Packard's offer, quit the business, and brought this suit."

The alternative ground of the decision was stated by the court below as follows:

> "3. Though Packard had formerly expressed an intention not to renew its contract with Webster, Packard offered and Webster refused the usual renewal. That Packard had agreed with Zell not to renew Webster's contract again when the proffered renewal expired is immaterial, not only because the agreement was legal but also because it inflicted no damage."

This alternative ground involved a simple non-federal question as to the legal effect of Webster's refusal of the usual renewal of its dealership agreement. The decision on this ground was clearly correct. In any event, Webster has presented no reason, and no reason exists, why this Court should review the decision below on this completely dispositive issue.

B. The Antitrust Ground of the Decision

In so far as the issues in the present case involved questions under the antitrust laws, there also is no reason why this Court should review the decision below.

1. There is no conflict with the decision of any other court of appeals on the same matter.

Webster fails to show any conflict between the decision below and the decision of any court of appeals. In fact, the decision below is in harmony with all court of appeals authority on the same matter. *Schwing Motor Company, Inc.* v. *Hudson Sales Corporation*, 239 F. 2d 176 (4th Cir. 1957); *Hudson Sales Corp.* v. *Waldrip*, 211 F. 2d 268 (5th Cir. 1954); *cert. denied* 348 U. S. 821 (1954); *Feddersen Motors, Inc.* v. *Ward*, 180 F. 2d 519 (10th Cir. 1950).

2. The decision below is not in conflict with any applicable decision of this Court and does not involve any important question of federal law which has not been, but should be, settled by this Court.

Webster bases its petition essentially on contentions (a) that the decision below is in conflict with and constitutes a misapplication of *United States* v. *duPont & Co.*, 351 U. S. 377 (1956) (the *Cellophane* case), (b) that the court below failed to apply the rule of reason and (c) that the decision below conflicts with *United States* v. *duPont & Co.*, 1 L. Ed. 2d 1057 (June 3, 1957) (the *General Motors* case).

a. The *Cellophane* case

Webster relies upon the monopoly concept for proof of violation of both Section 1 and Section 2 of the Sherman Act, treating Zell's alleged "monopoly" in Baltimore as the essential element of unreasonable restraint of trade. The first of Webster's Questions Presented (p. 2) is as follows:

> "Whether an agreement or conspiracy between a manufacturer and its largest dealer, at the instigation of the latter, to eliminate the dealer's competitors, *for the purpose of giving the dealer a monopoly* in the sale of the manufacturer's product, is immunized as a matter of law from the prohibitions of *sections 1 and 2 of the Sherman Act* on the theory that the manufacturer might have unilaterally decided to grant an exclusive dealership." [Italics supplied.]

Webster contends that the court below in considering the question of "monopoly" ignored a jury decision on the scope of the relevant market in deference to the following statement of this Court in the *Cellophane* case (p. 393):

> "* * * However, this power that, let us say, automobile or soft-drink manufacturers have over their trademarked products is not the power that makes an illegal monopoly. Illegal power must be appraised in terms of the competitive market for the product."

However, what the court below did was not to ignore the jury decision but rather to do what it was required to do: it determined whether there was sufficient evidence to support the verdict.

On the record before it in this case, the court below held correctly that there was no evidence to support a jury decision that the relevant market was a Packard market. Indeed, the overwhelming undisputed evidence in the record compelled the conclusion that the relevant market was the automobile market (R. 475, 493-4, 498-9, 668-9, 671, 672-3, 704-5, 193, 207, 361, 376-7, 452; Def. Ex. 26, R. 1131).

There is no basis for any contention by Webster that the court below misapplied the principles of the *Cellophane* case. The court below correctly applied such principles to the record in the present case, concluding:

> "* * * Since there are other cars 'reasonably interchangeable by consumers for the same purposes' as Packard cars and therefore in competition with Packards, an exclusive contract for marketing Packards does not create a monopoly. And there is no evidence of any attempt or conspiracy to create a monopoly, since there is no evidence of any attempt to get control of the relevant market."

b. The Rule of Reason

Webster contends that the court below, in considering whether there was a violation of Section 1 of the Sherman Act, ignored the rule of reason and substituted a doctrine of

per se legality. Webster's whole argument in this connection is based upon a distortion of the court's decision.*

The court below did not purport to hold that exclusive dealerships are legal *per se*. The language upon which Webster bases it argument in this connection is contained in a quotation from Professor Handler's Annual Antitrust Review and is to the effect that, prior to the decision below, "the rule was virtually one of *per se* legality". This language does not express the basis of the court's conclusion that there was no violation of Section 1 here. Far from applying any *per se* rule, the court recognized the necessity of determining whether there was sufficient evidence to permit the jury to find that there was an unreasonable restraint of trade, and rested its conclusion on a careful analysis of the undisputed facts.

On the basis of the undisputed facts, the court below reached the following conclusion:

> "The short of it is that a relatively small manufacturer, competing with large manufacturers, thought it advantageous to retain its largest dealer in Baltimore, and could not do so without agreeing to drop its other Baltimore dealers. To penalize the small manufacturer for competing in this way not only fails to promote the policy of the antitrust laws but defeats it."

---

*To accomplish this distortion Webster resorts to the following misleading use of quotation marks, attributing to the court below language which it never used:

"* * * In such circumstances, the Court declared, exclusive dealerships are '*per se* lawful' * * *" (p. 6)

"* * * the court below has invented a rule of '*virtual per se legality*' * * *" (p. 8)

"No court has ever before announced the doctrine that exclusive dealerships are 'virtually *per se legal*.'" (p. 13)

"* * * None of the other cases relied on by Packard supported the doctrine that exclusive dealerships are 'virtually *per se* legal'." (pp. 21-2)

Thus the decision below involved neither the enunciation nor the application of a *per se* rule as to liability under Section 1 of the Sherman Act.

c. The *General Motors* case

Webster contends (p. 3) that the decision below, in conflict with the decision of this Court in the *General Motors* case,

> "* * * limits sections 1 and 2 of the Sherman Act to horizontal conspiracies between dealers, ruling out as non-actionable a vertical conspiracy between a manufacturer and a dealer to eliminate competition between dealers."

There is nothing in the majority opinion or the dissenting opinion which suggests that the decision below either involves such a limitation or is grounded upon a distinction between horizontal and vertical conspiracies.

CONCLUSION

It is respectfully submitted that the petition should be denied.

Respectfully submitted,

HAROLD L. SMITH
JEROME G. SHAPIRO
One Wall Street
New York 5, New York

ROBERT W. BARKER
744 Jackson Place, N. W.
Washington 6, D. C.
Attorneys for Respondents

APPENDIX

The Complaint

The complaint alleged, among other things, that Packard conspired with Zell for the purpose of giving Zell "a monopoly of the 'authorized' Packard sales and service business in Greater Baltimore", (par. 51, R. 15); that Packard informed Webster that its Dealer's Sales Agreements [made in standard printed form (R. 473)] would not be renewed (par. 65, R. 22); that Webster repeatedly requested renewal (par. 67, R. 22); that on June 4, 1952 Packard wrote Webster a letter which stated that the one-year term of Webster's agreement expired March 31, 1952, stated that on April 22, 1952 Packard had left with Webster the 1952-1953 renewal amendment [a standard printed form for one-year renewal (Pl. Ex.* 22, R. 980; R. 79)] which would extend the agreement another year, and stated that the amendment would not be accepted unless Webster signed and returned it by June 11, 1952 (par. 74, R. 25); that on June 11, 1952 Webster's attorney wrote Packard a letter which stated that Webster would sign the renewal amendment if it received certain "formal assurances" with respect to further renewals [the "assurances" demanded would have been collateral to the standard agreement (Pl. Ex. 6; Pl. Ex. 22, R. 980)] (par. 75, R. 25); that Packard's reply to this letter was as follows:

> "Regarding your letter of June 11, 1952, the entire terms of our offer to Webster Motor Car Company are contained in our letter to that company dated June 4, 1952. No commitment has been nor will be made with reference to any alleged understanding not contained in the proposed written

*References to plaintiff's exhibits appear as "Pl. Ex. .....".

> amendment referred to in our letter of June 4, 1952." (par. 75, R. 27);

that

> "Thereupon plaintiffs were forced to desist in their efforts to find an amicable solution to their grievances against Packard and advised the latter that having been forced out of the Packard business they would file suit for redress * * *." (par. 76, R. 27);

and that, as the intended and actual result of the conspiracy, Webster's agreement was terminated, and Zell acquired a monopoly of all "authorized" Packard business in Greater Baltimore (par. 79, R. 28).

Principal Facts Upon Which Webster Relied to Show That There Was a Conspiracy to Violate the Antitrust Laws

As evidence of the alleged conspiracy, Webster relied primarily on what occurred at two conferences which Sidney Zell, President of Zell (R. 5), had with Packard representatives and decisions made by Packard on the subjects of the conferences. The essential facts in this connection are not in dispute.

The first conference was in September, 1951. Those present were Mr. Zell, E. J. Platfoot, Packard's Eastern Division Sales Manger, and Marshall Beck, Packard's Washington Zone Manager (Def. Ex.* 17, R. 1080, 1081; R. 479, 77). At that time Packard had four dealers in the Baltimore area: Webster, Zell, DeBaugh (a marginal dealer who sold only 10 cars that year (Def. Ex. 81B, R. 1165)) and Schulte Motor Sales, Inc., hereinafter sometimes referred as to "Schulte" (R. 76-7). Schulte was quitting; he later signed a mutual cancellation agreement which became effective January 11, 1952 (Def. Ex. 17,

*References to defendants' exhibits appear as "Def. Ex. .....".

R. 1080, 1081-2; Def. Ex. 20, R. 1085; Pl. Ex. 29A, R. 993; R. 563, 940).

This conference concerned a decision of Packard as to whether to appoint a new dealer to succeed Schulte. The discussion at the conference is described in a memorandum from Mr. Platfoot to Clare E. Briggs, Packard's General Sales Manager (R. 77). This memorandum (Def. Ex. 17, R. 1080, 1082-3) was, in part, as follows:

> "Due to the fact that Mr. Zell is familiar with this mutual cancellation from Schulte Motor Sales, Incorporated, he was very much interested in knowing whether we were going to put another dealer in Baltimore because he wanted to make his plans immediately. By that he meant that he would give up the Packard franchise because year-to-date the return on his investment has been very small, and with the possibility of a shortage of cars, he feels he would lose money.
>
> "He assured us that if we would go along for the present time with only two dealers and not install a third one, he would set up an organization with our assistance and would make up the 100 cars that Schulte has sold this year. * * *
>
> "At this particular point a decision had to be made since Schulte was going out of business and if Zell decided to do likewise, it would leave us with only one dealer in the city of Baltimore, and not a very strong one at that. From our experience in the past year, I believe you will agree that it is rather difficult due to the uncertainty of the times to get a new dealer as large as Mr. Zell. I am sure that in losing Mr. Zell we would lose a great deal of prestige and very likely would not be able to get the facilities that Mr. Zell now has.
>
> "Mr. Zell was very serious in his conversation and said that we have never given him an opportunity to show us that his organization can maintain Packard price class, and he felt that he was at least enti-

tled to this request, and if it could not be done, he would bow out graciously. This request has come up before from Mr. Zell, and it has been in his mind for a considerable length of time. I am very sure that he was most serious in his decision in relinquishing the Packard franchise.

"This I agreed upon, and I am sure that I am correct. Under the circumstances, I agreed with Mr. Zell and Mr. Beck not to appoint another dealer in Baltimore for the present and, therefore, give Mr. Zell the opportunity to prove that he can do the job. * * *"

The second conference was on January 29, 1952, four months after the first (R. 77, 558-9). It took place in New York City, while several Packard employees were there attending an N. A. D. A. convention (R. 478-9, 558-9, 581-3). The Packard employees present were Clare E. Briggs, General Sales Manager; Roy Abernethy, Assistant General Sales Manager in Charge of Eastern Division; Leroy Spencer, Executive Vice President; Leo E. Fenn, new Eastern Division Sales Manager; and Marshall Beck, Washington Zone Manager (R. 77).

The discussion at the New York conference is described as follows in the answer to Plaintiffs' Interrogatory 27c (R. 54, 65), which Webster's counsel introduced and read in evidence:

"27c. Mr. Zell stated that he had been unable to get sufficient volume and had been losing money; that the owner of premises which he leased for a service station was pressing for a renewal and he had to let the owner know about renewal but he refused to sign a new lease until he had had an opportunity to talk with Packard; that he would not continue doing business for Packard in the red and if he were not made sole dealer in Baltimore he would have to quit; that he was confident that if made sole dealer in Baltimore he could improve Packard's price class position there and satisfy Pack-

> ard's demands in Baltimore and he requested an opportunity for a trial period to demonstrate his ability to do so; that in order to obtain a larger percentage of price class in Baltimore he would augment and strengthen his organization and facilities and increase trade-in allowances. The Packard representatives inquired as to Mr. Zell's general set-up, how many employees he had and what he thought he could do if given the opportunity. The Packard representatives told Mr. Zell Packard would take his request under consideration and notify him of its decision. Mr. Zell requested notification within two weeks. Neither Webster nor DeBaugh was discussed."

The discussion is described similarly in the testimony of Messrs. Briggs, Abernethy and Beck (R. 479-80, 559, 576-7, 594-5, 259-61).

Mr. Briggs took Mr. Zell's request under consideration; he discussed it with Mr. Abernethy, with Mr. Armstrong, Mr. Briggs' administrative assistant, and others; and, after considering various reports and other information on the Baltimore situation, he decided that Packard should comply with the request (R. 475-7, 478, 480, 482-3, 487, 560-3, 690-2). He thereupon directed Mr. Abernethy to make Zell the sole dealer in Baltimore (R. 488-9). Mr. Abernethy passed the direction on to Mr. Beck who notified Mr. Zell of Packard's decision (R. 564; Pl. Ex. 33, R. 997).

Principal Facts Upon Which Respondents Relied to Show That There Was No Conspiracy to Violate the Antitrust Laws

Just as there was no dispute as to the principal facts upon which Webster relied to show the alleged illegal conspiracy, so the principal facts upon which appellants relied to show that there was no such conspiracy were beyond dispute.

Packard, one of the so-called "independents", cannot monopolize; it cannot restrain the stiff competition from other makes which it must face. Respondents contended that what Packard did was done for the proper business purpose of protecting and improving its competitive position in Baltimore. The undisputed facts clearly demonstrate this.

There was nothing unusual about Packard's decision to make Zell the sole dealer in Baltimore. Packard had 1600 dealers, 1100 of whom were the sole dealers in their respective cities, some nearly as large as Baltimore (R. 473-4, 487). Sole dealers were not unusual in the industry; indeed, Packard's ratio of sole dealers to total dealers was typical (R. 474, 577). Cadillac had only one dealer in Baltimore (R. 361).

In common with other automobile manufacturers, Packard measures its competitive position by its price-class percentage—a percentage representing Packard's proportion of new cars registered in Packard's "price class", which includes Cadillacs, Lincolns, Chryslers, Oldsmobiles and other makes constituting Packard's principal competition (Def. Ex. 26, R. 1131; R. 671-3, 668-70, 475, 488, 704-5). At the time when Zell requested that it be made the sole dealer in Baltimore, Packard was dissatisfied with its price-class percentage in Baltimore; from a price-class standpoint, Baltimore was what Packard termed one of the "terrible towns" (R. 477, 514, 588; Def. Ex. 10A, R. 1078).

At the time when it considered whether it should comply with Zell's request, Packard had good reason to believe that Webster was not a satisfactory dealer. Mr. Briggs had read reports indicating this (Def. Ex. 15, R. 1073, 1074; Def. Ex. 16, R. 1075, 1076; Def. Ex. 17, R. 1080; R. 474, 475-7, 478), and Messrs. Abernethy and Armstrong had received similar reports at a recent Sales Division meeting (R. 689-90). A very serious fault disclosed by these reports was that Webster was a "tight trader" whose retention of a high

gross profit per car, "abo louble the national average", hurt both Packard and th public by limiting volume and increasing prices (Def. Ex. 5, R. 1073, 1074; Def. Ex. 16, R. 1075, 1076; Def. Ex. 17, R. 1080-1; R. 475-7, 507, 511).

Packard believed that Zell's intention to quit if not made the sole dealer in Baltimore required it to make a choice between Zell and Webster (R. 482-3, 560-1, 562, 690-2, 712). The principal considerations which led to Packard's choice of Zell instead of Webster were as follows:

(1) Packard believed that it was very important to Packard to keep Zell because (a) Zell was a much larger dealer than Webster and was one of Packard's largest and best dealers (R. 482-4, 560-1, 691-2); (b) Zell had a national reputation among dealers and if Packard lost Zell it would lose a great deal of prestige (R. 483-4; Def. Ex. 17, R. 1083); and (c) Packard had difficulty competing with the Big Three for suitable dealers and felt that it could ill afford to lose a dealer like Zell, for which it probably could not get an adequate replacement (R. 484, 487, 519, 563; Def. Ex. 17, R. 1083).

(2) It was Packard's opinion that Zell was, and Webster was not, qualified to be the sole dealer because Packard believed (a) that Zell had, but Webster did not have, adequate facilities, working capital and location to handle Baltimore alone (R. 482-6, 560-1, 691-2)*; and (b) that Zell was aggressive about going after volume and increasing Packard's market penetration, but Webster, being a "tight trader", was not (R. 475-7, 484-5, 507).

(3) Mr. Zell had expressed confidence in his ability as sole dealer to improve Packard's price-class posi-

* A comparison of Zell's and Webster's working capital by months in 1951 is set forth in Defendants' Exhibit 81F (R. 1176).

tion in Baltimore by strengthening his organization and facilities and increasing his trade-in allowances (R. 576-7; *supra*, pp. 16-17). Since, as the trial court observed (R. 573), any manufacturer wants to sell as many units as possible, Packard felt that it was in Packard's interest to give Zell the opportunity to do this (R. 560-1, 572, 576-7).

(4) Packard anticipated that the public as well as Packard would benefit from Zell's becoming the sole dealer in Baltimore because it expected that Zell, being a large volume dealer in need of greater volume to support its large operation, would trade liberally with customers in order to get the volume (R. 485-6, 519-20, 560-1, 576-7, 577-8).

Effect of Zell's Becoming Sole Dealer

Webster's theory is that the public necessarily was injured when there no longer were two Packard dealers in Baltimore competing with each other. As sole Packard dealer in Baltimore, however, Zell had vigorous competition, both from other Packard dealers and from dealers for other makes.

Zell did not have exclusive Packard selling rights (Def. Ex. 37; R. 481-2). Defendants' Exhibit 81C (R. 1166) shows that, during the first year and a half of Zell's sole dealership, 110 persons in Zell's selling area (Def. Ex. 37, R. 1136, 1139) purchased Packards from Packard dealers other than Zell. For example, there was a Packard dealer at Bel Air, Md., from whom many Baltimore people purchased Packards (R. 336).

In any event, Zell's market was not a "Packard" market; it was an automobile market (R. 475, 493-4, 498-9, 668-9, 671, 672-3, 704-5; 193-4, 207, 361, 376-7, 452; Def. Ex. 26, R. 1131). The extent of the competition which Zell

had from dealers for other makes is made clear by Defendant's Exhibit 26 (R. 1131-); it shows that Packard's percentage of its price class in Baltimore in 1953, which did not include Ford, Chevrolet, Plymouth or other low-priced cars (Def. Ex. 27D), was only 8.11%.

In the light of the competitive situation, it is clear that Zell was not in a position as sole dealer to charge excessive prices or otherwise injure the public. On the contrary, the public benefited from Zell's becoming sole dealer and would have been injured if Zell had quit.

Defendants' Exhibit 26 shows that in 1953, the first full year of Zell's sole dealership, Packard's price-class percentage in Baltimore was substantially higher than it had been in 1951, the last full year in which Webster operated as a dealer (Def. Ex. 26, R. 1131; R. 672-5; see also R. 577, 590-1). This price-class improvement, in what then was a buyer's market (R. 705-6, 570-1, 247), indicates that Packard was giving the public the benefit of better price competition than before Zell became the sole dealer.

Defendants' Exhibits 81G and 81H show that Zell's percentage of used cars of other makes taken in trade exceeded Webster's percentage in 1950 and 1951 and increased substantially in 1952 and 1953 (Def. Ex. 81G, R. 1177; Def. Ex. 81H, R. 1178; R. 822). This indicates that while Webster was still operating Zell competed more effectively with other makes than Webster did, and that after Zell became sole dealer its competition with other makes was even more effective than it had been previously.

Comparison of Defendants' Exhibits 81I and 81J shows that during 1950, 1951 and 1952 Zell gave the public better prices than Webster did, and in 1953, the first full year of its sole dealership, Zell gave the public substantially better prices than Zell or Webster had given before. These exhibits indicate the benefit derived by the public from the portion of car gross profits given to customers by the

respective dealers in the form of "trading loss" (R. 1179, 1180; R. 813-14, 815-17, 819-21). From these two exhibits and the other evidence showing Webster to be a "tight trader" (*supra*, pp. 18-19), it is obvious that the public paid lower prices after Zell became sole dealer than it would have had to pay if Zell had quit.

There was no proof of any diminution or inadequacy in the number of new Packard cars moving in interstate commerce and available in Baltimore resulting from Zell's becoming sole dealer. On the contrary, the evidence shows that there were many more new Packard registrations in Baltimore in 1953, the first full year of Zell's sole dealership, than in 1951, the last full year of Webster's dealership; and that Packard's stock of new cars available to Zell in 1953 exceeded substantially that available to Baltimore dealers in 1951 and 1952 (Def. Ex. 26, R. 1131; Def. Ex. 81A, R. 1164; R. 704).

Proximate Cause of Alleged Injury to Webster

Explaining his demand for "assurances" (*supra*, p. 13) in his summation, Webster's counsel said (R. 933):

> "* * * We only asked for the same kind of treatment they were giving every other dealer in the United States, and the same kind of treatment they had given us. * * *"

That is exactly what Packard offered. The proposed renewal amendment was Packard's standard form of one-year renewal (Pl. Ex. 22, R. 980; R. 79). It was the same kind of renewal agreement that Webster had gotten in 1947, 1948, 1949, 1950 and 1951 (R. 665). Webster's agreement always had been on a one-year basis, expiring on March 31st each year unless renewed (R. 217).